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No. — 367

In the Supreme Court of the United States

OCTOBER TERM, 1954

FEDERAL POWER COMMISSION, PETITIONER

v.

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit setting aside an order issued December 21, 1951, by the Commission, granting a license to Portland General Electric Company for the construction, operation and maintenance of a hydroelectric project on the Deschutes River in Oregon.

OPINIONS BELOW

The opinions in the United States Court of Appeals for the Ninth Circuit are reported at 211 F. 2d 347, and are reprinted in Appendix B, *infra*, pp.

16a-37a. The opinion and order of the Federal Power Commission granting the license (R. II, 417-447) are reported at 92 P.U.R. (N.S.) 247.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1954 (see Appendix B, *infra,* p. 38a). A timely petition for rehearing was denied on April 28, 1954 (Appendix B, *infra,* p. 39a). On July 23, 1954, Mr. Justice Black extended the time within which to file a petition for a writ of certiorari to and including September 25, 1954 (Appendix B, *infra,* pp. 39a-40a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and Section 313(b) of the Federal Power Act (49 Stat. 860, 16 U.S.C. 825*l*).

QUESTIONS PRESENTED

1. Whether by reason of the Desert Land Act of 1877, and related legislation, the United States has irrevocably surrendered to the western States its powers over non-navigable waters on Government-owned lands within these States, so that the States may exercise their police power to control and regulate use of, and rights to, the waters on such lands in a manner contrary to that directed by the appropriate federal agency.

2. Whether, in any case, the Desert Land Act and related legislation applies to Government lands which are not "public lands" but have been reserved for power purposes.

3. Whether permits from the Fish and Hydroelectric Commissions of the State of Oregon are

conditions precedent to the grant of a license by the Federal Power Commission under the Federal Power Act for a hydroelectric project which will utilize, without interference with prior appropriations (if any), waters flowing across Government lands which were reserved by the United States for the Indians before 1877 and for power-site purposes many years before Oregon enacted its regulatory laws for the protection of fish in State waters and the licensing of water-power projects.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act (49 Stat. 838, 16 U.S.C. 791a, *et seq.*); of the Desert Land Act and related legislation (19 Stat. 377, 43 U.S.C. 321; 14 Stat. 253, 43 U.S.C. 661; 16 Stat. 218, 43 U.S.C. 661); of the Act of Congress establishing Oregon as a territory and providing for its admission to the Union (9 Stat. 323, 328); and of the Constitution and Laws of Oregon (Art. XVIII, Sec. 7, Constitution of Oregon, 1859; Sections 83-314, 83-316, 119-102, 119-103, O.C.L.A.), are set forth in Appendix A, *infra,* pp. 1a-15a.

STATEMENT

By order issued December 21, 1951, the Federal Power Commission (Commission) granted a license under Part I of the Federal Power Act to Portland General Electric Company[1] to construct,

[1] The application of the Portland General Electric Company was as successor in interest to the Northwest Power Supply Company (R. II, 418). The Northwest Power Supply Company of Portland, Oregon was originally organized in 1949 by

operate, and maintain the Pelton hydroelectric project, designated by the Commission as Project No. 2030, in Jefferson County, Oregon, on the Deschutes River, below the point where the Metolius and Crooked Rivers, principal tributaries of the Deschutes, flow into the latter (R. II, 417-447).

The Pelton project:— As described by the Court of Appeals (Appendix B, *infra,* p. 17a), the Pelton project "is designed to consist of a concrete dam approximately two hundred five feet high in connection with a power house containing three 36,000 kilowatt generators and is to be built on United States land" across the Deschutes River (a stream which the Commission did not find navigable[2]). Included in the project, "and three miles below the power dam, a 're-regulating' dam is to be constructed which is designed to equate the flow of water as it is released from the upper dam."[3] This lower dam will not be located upon federally owned

three operating utility companies to secure a license for development of the Pelton Hydroelectric Project. Subsequently, two of the sponsoring companies became interested in other power developments, leaving the Portland General Electric Company of Portland, Oregon, as the only one of the operating companies directly interested.

[2] The Commission made no findings as to the navigability of the Deschutes River at the site of the project. For purposes of this case, therefore, it is assumed that the Deschutes River is not "navigable waters" of the United States as defined in Section 3 (8) of the Federal Power Act (16 U.S.C., 796 (8)).

[3] As the court noted (Appendix B, *infra,* p. 17a), without the "re-regulating" dam the flow below the power dam would be subject to extreme fluctuations as the water would be released from the power dam in much greater quantities at times of peakload operation. By the operation of the re-regulating dam, however, the wide fluctuations in flow im-

or controlled lands. The project also incorporates facilities for the conservation of the stream's fishery resources, which are not referred to in the court's description of the project (R. II 325, 326, 337-338, 420, 431). As designed, the project would neither divert water from the Deschutes River nor encroach upon any vested rights to the use of water in that stream.[4]

The project will occupy lands of the United States on the east and west sides of the Deschutes River. Those on the west side are within and are a part of the Warm Springs Indian Reservation established by treaty in 1855[5] which secures to the Indians the use of the waters for agricultural purposes and "the exclusive right of taking fish in the streams running through and bordering said reservation" (12 Stat. 964). The lands on the west side

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mediately below the power house will be equated and the flow downstream from the re-regulating dam will be substantially the same as that which would have prevailed without the project.

[4] The license is subject to the condition that the "use of waters in the Deschutes River and its tributaries in connection with the Licensee's project under this license shall be subordinate to" all "existing rights, whether or not perfected, to the waters of the Deschutes River and its tributaries for domestic, stock, municipal and irrigation purposes" and to the use of certain specified "additional flows * * * pursuant to rights which may be initiated hereafter for the diversion and storage of waters for domestic, municipal, stock and irrigation purposes in connection with any reclamation projects undertaken pursuant to the Federal Reclamation Laws * * *" (R. II, 443-444).

[5] Treaty of June 25, 1855, with Indians in Middle Oregon establishing Warm Springs Indian Reservation, 12 Stat. 963.

were also withdrawn for power purposes in 1910,[6] and those on the east side of the river were withdrawn from entry, location, or disposal under the public land laws and were reserved for power purposes in part in 1909[7] and the remainder in 1913.[8] In short, as the court recognized, the "high power dam, and the powerhouse immediately below, will be located entirely upon lands of the United States set aside and reserved for power purposes." (R. II 331, 418, 433; Appendix B, *infra,* p. 18a).

The proceedings before the Commission: At the hearing before a Presiding Examiner of the Commission, the State of Oregon, its Fish and Game Commissions, and the Oregon Division of the Isaak Walton League of America, Inc., intervened (R. II 324-325, 418) and objected to the issuance

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[6] Indian Power Site Reserve No. 2, created November 1, 1910, by the Secretary of the Interior pursuant to Act of June 25, 1910, 36 Stat. 855.

[7] Power Site Reserve No. 66, created December 30, 1909, by order of the Secretary of the Interior, made permanent by Executive Order of July 2, 1910, pursuant to Act of June 25, 1910, 36 Stat. 847.

[8] Power Site Reserve No. 294, created by Executive Order of October 8, 1913, pursuant to the Act of June 25, 1910, 36 Stat. 847. There was a further reservation of the lands on the east side of the river involved in the Pelton project upon the filing of an application for license for Project No. 57 in 1920, and upon the filing of an application for the Pelton project, since Section 24 of the Federal Power Act (Appendix A, *infra,* pp. 5a-7a), in pertinent part, provides:

> Any lands of the United States included in any proposed project under the provisions of this Part shall, from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress.

of the license on the ground that the construction and operation of the project will prevent the ascent of anadromous fish to their spawning grounds above the dam site; will result in the serious curtailment of the fish population and prevent its increase; and will impair the productivity and usefulness of the State's Metolius fish hatchery located on the Metolius River upstream from the project site (R. II 418-419; Appendix B, *infra*, p. 18a). The State agencies further contended that the issuance of permits by the Hydroelectric Commission of Oregon[9] and the Oregon Fish Commission,[10] which had refused to issue them because of

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[9] In 1931, Oregon enacted legislation providing for the licensing of the construction and operation of water-power projects by its Hydroelectric Commission and forbade the appropriation and use of the waters of the lakes, rivers, streams, or other bodies of water within the State of Oregon, including waters over which the State has concurrent jurisdiction, in connection with the development of any water-power project for the generation of electricity and the construction of water-power projects in such waters, except in accordance with a license issued by the State commission (8 O.C.L.A. §§ 119-102, 119-103, Appendix A, *infra*, pp. 11a-12a).

[10] In 1921, Oregon adopted legislation declaring unlawful the construction or maintenance of dams in streams "frequented by salmon or other food fish" without "a passageway for such fish over such obstructions" (5 O.C.L.A. § 83-314, Appendix A, *infra*, pp. 12a-14a) and providing for the issuance of permits by the Oregon Fish Commission for the construction of dams "to a height that will make a fish ladder or fishway thereover impracticable" upon condition that the applicant shall first convey to the State a site for the erection of a hatchery as specified by the Fish Commission, erect the hatchery according to plans and specifications furnished by that commission, and agree to furnish water and light, at no expense to the State, to operate the hatchery (5 O.C.L.A. § 83-316, Appendix A, *infra*, pp. 14a-15a).

the effect of the project on the fish in the stream,[11] was a condition precedent to the construction of the project and that without such permits the construction and operation of the project may not be licensed by the Federal Commission (R. II 419; Appendix B, *infra*, pp. 18a-19a). On the other hand, the Tribal Council of the Warm Springs Indian Reservation, which was represented at the hearings, gave its consent to the construction of the project (R. II 354, 498; Appendix B, *infra*, p. 21a).

After the hearings, the Presiding Examiner issued a Recommended Decision, subject to Commission review, granting a license for the construction, operation, and maintenance of the Pelton project (R. II 321-390). Exceptions were filed by the State of Oregon and its Fish and Game Commissions (R. II 390-414), and on review the Commission issued an opinion (No. 222) and order, on December 21, 1951, granting a license for the construction, operation, and maintenance of the project subject to certain specified conditions, including conditions relating to fish conservation (*supra*, p. 5) (R. II 417-447).

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[11] The Portland General Electric Company had proposed to the Oregon Fish Commission to undertake extensive development in the construction of the reregulating dam and facilities for the protection of anadromous fish (R. II, 420, 506-507). Total cost of that undertaking would be at least $4,430,000, with an annual cost of $410,000; costs of operation and maintenance of the reregulating construction would be $10,000; in addition to those costs, the Company offered to contribute $100,000 a year as its share of the operation and maintenance of the fishery conservation facilities. The Fish Commission and the Hydroelectric Commission nevertheless refused to issue the permits.

The Commission found (R. II 433) that a license was required under the provisions of the Federal Power Act because the project would affect lands of the United States and a reservation of the United States;[12] and that the refusal of the Oregon Fish and Game Commissions to issue permits for the construction of the project "is not a bar to the issuance of a Federal Power Act license and to the construction and operation of the proposed project under such license, if that project is found to meet the standards specified for comprehensive water power development in the Federal Power Act."

The Commission referred to the severe power shortage in the Pacific Northwest as a matter of national concern, and found that construction of the Pelton project will be in the public interest, will provide for comprehensive development of the affected stretch of the Deschutes River as required by Section 10(a) of the Act (Appendix A, *infra,* p. 5a), and will be consistent with further comprehensive development of the stream and of the Columbia River Basin, including conservation and possible enhancement of the fishery resources of the Deschutes River (R. II 422, 427). The Commission also found that the improvements to be provided by the project will contribute valuable public benefits which will not accrue if the river is maintained in its present natural condition (R. II 427).

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[12] The Commission did not base its authority on the navigability of the Deschutes River. See fn. 2, *supra,* p. 4.

The proceedings before the Court of Appeals: Following denial by the Commission of their application for rehearing (R. II 481-482), the State of Oregon and its Fish and Game Commissions filed a petition for review in the Court of Appeals for the Ninth Circuit, as authorized by Section 313 (b) of the Power Act (R. II 495-496), and on February 18, 1954, the Court of Appeals (per Stephens, Orr, JJ.), set aside the Commission's order granting the license (Appendix B, *infra,* pp. 16a-30a). Judge Healy dissented (Appendix B, *infra,* pp. 30a-37a).

The majority of the court agreed (Appendix B, *infra,* p. 29a) that the Commission "has the legal right to give its *approval* to the Project as a whole" and "has the right to grant its *permissive license* to the *construction* of the proposed dam upon its own property" (emphasis in original), but held that the Commission in this case "exceeded its legal jurisdiction" when it "issued a license purporting to grant the complete legal right to the construction and operation of the whole Project" "in that the ownership of the power dam site does not empower the United States government to use the waters of the Deschutes River either at the site of the power dam or elsewhere, contrary to the Oregon state law." The Commission, according to the majority (Appendix B, *infra,* p. 30a), "trenched upon the sovereignty of the State of Oregon" over the Deschutes River.

The fundamental basis of the majority's decision appears to be that by the Desert Land Act of 1877, and related statutes, Congress irrevocably

surrendered to the States all regulatory power over nonnavigable waters on arid or semi-arid lands in the public domain and wiped out, "[w]hatever, if any, limitation there was on Oregon's complete sovereignty over the waters of the Deschutes River" (Appendix B, *infra*, p. 29a). The "regulation of the river as it flows through the state," the court held (Appendix B, *infra*, p. 29a), "is one of the powers of the state's sovereignty and includes regulatory powers as to fish in state waters."

Judge Healy, dissenting, disagreed that the Commission "lacks jurisdiction to license the construction of the proposed hydroelectric plant" or "trenched upon the sovereignty of the State of Oregon" (Appendix B, *infra*, p. 30a). In his view, the Desert Land Act of 1877 and related legislation, is inapplicable since these statutes apply only to "public lands," in the accepted technical sense, whereas the Pelton project was to occupy tribal lands and lands reserved for power purposes, which were Government-owned but not "public lands" (Appendix B, *infra*, p. 32a). Accordingly, he held that the United States has not consented to State control of fishing resources in the waters of the Deschutes River on lands of the United States reserved for power purposes or reserved for the Warm Springs Indians who had given their consent to the project (Appendix B, *infra*, pp. 32a-34a). The dissent concluded, therefore, that under *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U.S. 152, "state laws or objections

cannot stand as a legal bar to federal authorization of a power project which is within federal competence and which, in the judgment of the Commission, will be in the public interest and will meet the standards specified in the Federal Power Act for comprehensive power development" (Appendix B, *infra*, p. 37a).

REASONS FOR GRANTING THE WRIT

This case is of vital public significance. The dominant underlying issue is whether the western States may, through the exercise of their police power, regulate and control the use of the waters of non-navigable rivers on all Government-owned lands, whether or not "public lands." Viewing the Desert Land Act as an irrevocable surrender to the States of all rights of the United States in the waters of such streams, appropriated or unappropriated, the court below declared that the State's will must prevail over the orders of the Federal Power Commission issued under the Federal Power Act. This case involves the Power Act and Government lands withdrawn from the public domain for power purposes, but the reach of the holding below extends to the authority of other federal agencies to administer, in accordance with the will of Congress, the vast areas withdrawn from the public domain in the West for other purposes—military enclaves, Indian reservations, national forest reserves, national parks, grazing districts, reclamation projects, veterans' facilities, and other areas essential to our national defense or welfare.

Even as limited to federal power activities, the decision below concerns not only the present applicant but may affect every license application involving the use of nonnavigable waters flowing across lands of the United States where, as here, the Commission's jurisdiction rests solely on the proposed occupancy of such lands.[13] The decision is of importance also to existing licenses based solely on occupancy of United States lands where there may not have been compliance with State laws governing the construction and operation of water-power projects. The Court of Appeals, therefore, has decided a basic and important question in the administration of Part I of the Federal Power Act respecting the Commission's licensing authority based upon the occupancy of federal lands.

1. The United States admittedly owns the land on which the major dam is to be built, including the bed of the nonnavigable Deschutes River (*United States* v. *Utah*, 283 U.S. 64, 75)[14], as well

[13] In *State of Washington Dept. of Game* v. *Federal Power Commission*, 207 F. 2d 391, certiorari denied, 347 U. S. 936, the Ninth Circuit recently held that, where the Commission's authority to license stems from the navigability of the stream, its authority is not subject to State police power with respect to fish. If the present decision stands, the relationship of federal hydroelectric projects to state regulatory laws will depend, within the Ninth Circuit, upon whether the Federal Power Commission's authority rests on proposed occupancy of Government lands or on the navigability of the stream.

[14] It is settled that title to the bed of rivers passed to the States which were formerly territories when they were admitted to the Union, if the rivers were navigable; if they were not navigable, the title remained in the United States. Cf. *United States* v. *California*, 332 U.S. 19.

as the lands of the Indian reservation (*United States* v. *Rickert*, 188 U.S. 432; *Minnesota* v. *United States*, 305 U.S. 382; *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86). It is equally clear that, in the absence of federal legislation authorizing State action, such Government-owned property is immune from regulation or control by the State; properly authorized federal agencies may use and regulate the land, as well as its waters and resources, without regard to State regulatory laws. *Camfield* v. *United States*, 167 U.S. 518, 526; *Light* v. *United States*, 220 U.S. 523; *Hunt* v. *United States*, 278 U.S. 96, 100; *Arizona* v. *California*, 283 U.S. 423, 451-2; *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, 703. If that were not the rule, the properties of the United States, particularly in the semi-arid West, would be "completely at the mercy of state legislation". *Camfield* v. *United States*, *supra*. Unless, therefore, the Desert Land Act granted regulatory authority to the western States over such lands and waters as those involved here, the State of Oregon can have no foundation for its claim of control.

2. (a). The Court of Appeals committed plain, and very significant, error when it disregarded its own prior decisions and those of this Court that the Desert Land Act of 1877, 19 Stat. 377 (43 U.S.C. 321), like the related Acts of 1866 and 1870 (43 U.S.C. 661), "applies only to public lands and waters of the United States", subject to those Acts, and does not apply to lands set apart and reserved

from the public domain.[15] *Winters* v. *United States,* 143 Fed. 740, 747 (C.A. 9), affirmed, 207 U.S. 564; *United States* v. *McIntire,* 101 F. 2d 650, 653, 654 (C.A. 9); *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725, 748; *United States* v. *Rio Grande Irrigation Co.,* 174 U.S. 690, 706; *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U.S. 142, 158, 162, 163, 164; *United States* v. *Conrad Inv. Co.,* 156 Fed. 123, 127 (C.C.D. Mont.); *Minnesota* v. *Hitchcock,* 185 U.S. 378, 387. The correctness of this course of rulings is shown by the history, terms, and purpose of this set of early statutes.

Consideration of the Desert Land Act begins with the Acts of 1866 and 1870 for they are part of the intention of Congress "to further the disposition and settlement of the public domain." *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U.S. 142, 161. Section 9 of the 1866 Act (14 Stat. 251, 253, 43 U.S.C. 661, Appendix A, *infra,* pp. 9a-10a) provided:

> Whenever, by priority of possession, rights, to the use of water for mining, agricultural,

[15] "Public lands" are defined in the Federal Power Act (Section 3(1)), and are generally accepted, as lands of the United States which are "subject to private appropriation and disposal under public land laws." Kinney on Irrigation, § 124). They do not include lands *"withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws"* (Sections 3 (1), 3 (2), Appendix A, *infra,* p. 1a (emphasis added)). This is conceded but disregarded by the court below (Appendix B, *infra,* p. 21a, fn. 7). The Commission's authority to issue licenses for water-power projects on "any part of the public lands and reservations of the United States" is unquestioned. Section 4 (e), Appendix A, *infra,* pp. 2a-4a.

> manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; * * *.

The "object of the section was to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands." It "merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached." *Jennison* v. *Kirk,* 98 U.S. 453, 456-457, 459. It was "a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, [rather] than the establishment of a new one." *Broder* v. *Natoma Water and Mining Co.,* 101 U.S. 274, 276. There was "no grant of specific rights by the Congress of the United States." *United States* v. *Utah Power & Light Co.,* 209 Fed. 554, 560 (C.A. 8), affirmed, 243 U.S. 389. There was only recognition and assent "to the appropri-

ation of water in contravention of the common law rule as to continuous flow" by individuals in accordance with any system of local customs, laws and decisions in respect to the appropriation of water. *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, 704, 706. No general powers of regulation were given to the States; the Act was concerned only with the rights of private appropriators.

The 1866 Act was unclear whether it was limited to rights existing at the time of its enactment or whether rights of appropriation could thereafter be acquired. It was therefore amended by the 1870 Act (16 Stat. 217, 218, 43 U.S.C. 661, Appendix A, *infra*, p. 10a) to make it clear that the law not only protected and recognized existing rights to appropriate waters of the streams of the public domain as against "all patents granted, or preemption or homesteads allowed", but permitted the future acquisition of such rights where recognized by local law.[16]

Then came the Desert Land Act of 1877 (19 Stat. 377, 43 U.S.C. 321, Appendix A, *infra*, pp. 8a-9a) which authorized the entry and reclamation of desert lands within Oregon and other named States

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[16] Section 17 of the Act of 1870 provides:

> * * * all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory.

and Territories.[17] This was the last general statute providing for the acquisition by private persons of rights to waters of the streams of the public domain through appropriation. It required a declaration that the entryman intended to reclaim the land by irrigation. Then there followed this proviso:

> *Provided, however,* That the right to the use of water by the person so conducting the same * * * shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the *public lands* and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. [Emphasis added]

The consistent emphasis in the 1866, 1870 and 1877 legislation on the rights of private possessors, appropriators, and entrymen—taken together with the express reference to the "sources of water supply upon the *public lands* and not navigable"—

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[17] This Act covers the States of California, Colorado, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and North and South Dakota. The Ninth Circuit includes seven of these thirteen States.

prove that this and the lower federal courts (including the Ninth Circuit) have not erred in uniformly reading this body of legislation as applicable only to "public lands", *i.e.* those Government lands which are subject to private appropriation and disposal.[18]

(b). Moreover, the statutes culminating in the Desert Land Act do not go so far as to grant to the States all rights over the waters even of the public lands. Unquestionably, Congress expressed its purpose that "for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named." *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, 162. But reservation for future use, without more, is not synonymous with irrevocable surrender to the States of all the rights of the United States in and over the unappropriated waters of the public domain. To expand the limited terms of these Acts into such a sweeping and permanent grant would do violence to the well-settled principle that " * * * statutes

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[18] *California-Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, on which the court below relies heavily (Appendix B, *infra*, pp. 27a-28a), appears to deal solely with public lands since the Court was addressing itself to lands acquired by "patent from the United States under the Homestead Act of May 20, 1862" (p. 151). In discussing the Acts of 1866, 1870, and 1877, the Court refers frequently to the "public lands" and "public domain" (see pp. 155, 157, 158, 160, 161, 162) and speaks constantly in terms of settlers who obtained land under the homestead, preemption, and other federal land laws.

granting privileges or relinquishing rights of the public are to be strictly construed against the grantee." *United States* v. *Utah Power & Light Co.*, 209 Fed. 554, 559, affirmed, 243 U. S. 389; *Wisconsin Central R. Co.* v. *United States*, 164 U. S. 190; *Camfield* v. *United States*, 167 U. S. 518; *Leavenworth, Lawrence, & Galveston R. R. Co.* v. *United States*, 92 U. S. 733.

Also, since, as we have shown (*supra*, pp. 16-19), the purpose of the Desert Land Act was to promote development of the desert lands, there is no impelling reason to read the Act as an *irrevocable* surrender to the State of unappropriated waters or as precluding an additional beneficial use of appropriated water which does not in any degree impair vested rights. The proviso in the 1877 Act (*supra*, p. 18) was a mere declaration of policy respecting the waters unused by the entryman, which was subject to change at any time by Congress in the exercise of its constitutional power (U. S. Const., Art. IV, § 3, Cl. 2) to control the disposition and use of government property, subject, of course, to the condition that the change in policy may not affect existing vested individual rights. Cf. *Alabama* v. *Texas*, 347 U. S. 272; *United States* v. *City and County of San Francisco*, 310 U. S. 16, 29. No other construction is necessary to give full effect to the aims of the Desert Land Act.[19]

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[19] To follow the court below in its interpretation of the Desert Land Act is also to disregard numerous acts of Congress, enacted after 1877, purporting to exercise control over

Perhaps of even greater significance are the decisions of this Court and the Ninth Circuit's own holdings which conflict with the broad interpretation of the Desert Land Act (given in the opinion below) as an irrevocable grant of all power and rights. *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690; *Winters* v. *United States*, 207 U. S. 564, affirming 143 Fed. 740 (C. A. 9); *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 406, affirming 209 Fed. 554, 560. In the *Rio Grande* case, *supra*, this Court held that the Desert Land Act was not an irrevocable surrender of rights. The United States sought to enjoin a proposed diversion of the waters of the Rio Grande in the nonnavigable portions of the river which, for purposes of decision, the Court assumed would impair the navigable capacity of the lower reaches. It was contended by the Irrigation Company that the diversion was authorized by the 1866 Act and the Desert Land Act. Adverting to a later statute prohibiting obstructions to navigation without the consent of Congress (Act of September 19, 1890, 26

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nonnavigable waters on the public domain which disclose that Congress seems never to have regarded the Acts of 1866, 1870, and 1877 as irrevocable surrenders of the rights of the United States in the waters on the public lands. See, e.g., Act of June 3, 1878, c. 151, 20 Stat. 89, 43 U.S.C. 311; Act of March 3, 1891, c. 561, sec. 18, 26 Stat. 1101, 43 U.S.C. 946; Act of June 4, 1897, c. 2, 30 Stat. 36, 16 U.S.C. 481; Act of June 11, 1906, c. 3074, sec. 3, 34 Stat. 234, 16 U.S.C. 508; Act of June 25, 1910, c. 421, 36 Stat. 847, 43 U.S.C. 141, 142; and the Federal Power Act of June 10, 1920, c. 285, § 24, 41 Stat. 1075, 16 U.S.C. 818, Appendix A, *infra*, pp. 5a-7a.

Stat. 454, § 10), the Court rejected the claim, saying (174 U. S. at 707):

> As this is a later declaration of Congress, so far as it modifies any privileges or rights conferred by prior statutes it must be held controlling, at least as to any rights attempted to be created since its passage; and all the proceedings of the appellees in this case were subsequent to this act. * * *

In *Winters, supra,* the United States sued to restrain Winters and others from constructing or maintaining dams or reservoirs in the Milk River, a nonnavigable stream in Montana which, as in the instant case, formed one boundary of an Indian Reservation, or in any manner preventing the waters of the river or its tributaries from flowing to the Reservation. The Reservation had been established in 1888, subsequent to the Acts of 1866, 1870, and the Desert Land Act of 1877. Nonetheless, citing the *Rio Grande* case, *supra,* this Court held against Winters, saying (207 U. S. at 577), " * * * The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be."

California Oregon Power Co. v. *Beaver Portland Cement Co.,* 295 U. S. 142, relied on below (Appendix B, *infra,* pp. 27a-28a), is completely consistent with our position that the Desert Land Act was not an irrevocable surrender of federal rights in the waters of the public domain. That case in-

volved a conflict between two private parties; it did not present the question here involved, nor was disposition of that issue necessary to the decision. And opposed to the interpretation placed on the opinion by the Court of Appeals is the fact that the *Rio Grande* case, *supra*, was twice cited and quoted with approval (295 U. S. at 155, 158-159).

3.(a). The particular lands involved here are indisputably not now public lands and therefore, under the general principles we have discussed (*supra*, pp. 14-19), are not subject to the Desert Land Act. The portion on the east bank of the Deschutes River was withdrawn from entry, location, or disposal under the public land laws and reserved for power purposes in part in 1909, and the remainder in 1913, pursuant to the Act of June 25, 1910, 36 Stat. 847 (*supra*, p. 6).[20] It is immaterial that these withdrawals came after the Desert Land Act of 1877—although before the 1921 and 1931 laws of Oregon on which the State rests its case (see fns. 9 and 10, *supra*, p. 7)—because, as we have shown, the 1877 Act was not a grant by the United States to the States of its rights in nonnavigable waters on the public domain and in any event not an irrevocable grant. *Supra*, pp. 19-23.

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[20] The lands on the east bank were also withdrawn from entry and reserved for power purposes by the filing of an application for license in 1920 and by the instant application filed in 1949 as provided by Section 24 of the Federal Power Act. See fn. 8, *supra*, p. 6; Appendix A, *infra*, pp. 5a-7a.

What we have said with respect to the lands on the east bank of the river applies with equal, if not greater, force to those on the west bank within the Warm Springs Indian Reservation. For those lands were never a part of the public lands. They belonged to the Indians under the treaty of 1855 long before the Desert Land Act of 1877 was enacted. *United States* v. *Minnesota,* 270 U. S. 181, 206; *Winters* v. *United States,* 143 Fed. 740, 748 (C. A. 9), affirmed, 207 U. S. 564, 577; *United States* v. *McIntire,* 101 F. 2d 650, 653, 654 (C. A. 9); *United States* v. *Walker River Irr. Dist.,* 104 F. 2d 334, 339-340 (C. A. 9); *Shannon* v. *United States,* 160 Fed. 870, 873 (C. A. 9). "The United States became a trustee, holding the legal title to the land and waters for the benefit of the Indians" and "* * * no title to the waters could be acquired by anyone except as specified by Congress." *United States* v. *McIntire, supra.* And it has been said that no "subsequent law or sale should be construed to embrace or operate" upon the lands so reserved. *Winters* v. *United States, supra.*[21]

(b). In addition, the Desert Land Act (and the earlier legislation) would not grant the State the power it asserts here, even if the lands be viewed as part of the public domain. As we have pointed out (*supra,* pp. 19-23), those Acts do not bar Congress

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[21] Oregon law has clearly recognized such treaty rights of the Indians as exempt from State control. Act of August 14, 1848, 9 Stat. 323, Sec. 1 (Appendix A, *infra,* pp. 10a-11a); Oregon Constitution of 1859, Article XVIII, Sec. 7 (Appendix A, *infra,* p. 11a); *Anthony* v. *Veatch,* 189 Ore. 462, 482-485, 220 P. 2d 493, 502-3, 221 P. 2d 575.

from thereafter reserving the lands and waters, at least insofar as not already appropriated, for special purposes including power uses. The waters of the Deschutes River at and below the project site must be treated as unappropriated,[22] and therefore the reservations of the lands for power purposes, in 1909, 1910, 1913, 1920, and 1949 (see *supra*, pp. 6, 23) were fully effective, notwithstanding anything in the State's legislation.

4. Even if the Desert Land Act be regarded as an irrevocable surrender of the rights of the United States in nonnavigable waters on all Government lands (public domain or not), unaffected by the withdrawals, the 1921 and 1931 laws of Oregon (*supra*, p. 7) do not stand in the way of federal licensing of a utilization of the waters of the Deschutes for water-power purposes.

First, the consent of the Indians has been given to the occupancy of their reserved lands and to the interference with their right to and use of the stream. The Indians' rights in those waters are continuing ones against the United States and its

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[22] The record contains no evidence showing appropriation of the waters and it is not open to question that the construction and operation of the project will have no effect on existing rights of appropriation and use of the waters above or below the project site (Appendix B, *infra*, p. 17a). In fact, as heretofore noted, fn. 4, *supra*, p. 5, the license expressly provides that it is subject to existing appropriations and to specified unperfected appropriations (R. II 409-410).

Oregon does not assert that it has appropriated the waters of the Deschutes River by appropriation for beneficial purposes, nor that it has complied with the Desert Land Act's requirements for appropriation.

grantees, as well as against the State and its grantees. *United States* v. *Winans*, 198 U.S. 371. As the dissenting opinion below states (Appendix B, *infra*, p. 34a):

> It is thus indisputable that the Indian Tribe, not the State of Oregon, possesses authority, as granted by the treaty, to control fishing resources of the Deschutes bordering on its reservation no less than those in streams entirely within the boundaries of the reservation. As contemplated by § 10 (e) of the Federal Power Act, the Warm Spring Indians have given their approval to the Pelton project, hence have consented to the use of their lands for power purposes and to the consequent interference with their exclusive fishing rights.

Second, nothing in the Desert Land Act or its purpose justifies the conclusion that the local laws, customs, and decisions there given recognition include State regulations for the protection of fish. On the contrary, it seems clear that Congress did not intend to confer such power on the State. The Desert Land Act deals, in terms, only with the usual problems incident to use of water for irrigation and like purposes. Other federal legislation concerns fish. The Wildlife Resources Act of August 14, 1946, 60 Stat. 1080, 16 U.S.C. 661, for the conservation of wildlife, fish and game, provides (Section 2, 16 U.S.C. 662) that whenever "the waters of any stream or other body of water are authorized to be impounded, diverted, or other-

wise controlled for any purpose whatever by any department or agency of the United States, or by any public or private agency under Federal permit" such department or agency "shall consult with the Fish and Wildlife Service and the head of the" State agency "exercising administration over the wildlife resources of the State" with "a view to preventing loss of and damage to wildlife resources." The recommendations of the State agency as to the fish and wildlife resources are to be given due consideration but there is no requirement which makes them controlling. Instead, there is the assertion of federal control. House Rept. No. 1944, 79th Cong., 2d Sess., p. 3; *State of Iowa* v. *Federal Power Commission*, 178 F. 2d 421, 428, certiorari denied, 339 U.S. 979. In the case of a project requiring a license under the Federal Power Act, the final decision as to the resolution of the fishing resources is left up to the Federal Power Commission.

5. As the court below explicitly recognized (Appendix B, *infra*, pp. 22a-23a), once the 1866, 1870, and 1877 legislation is shown to be inapplicable, the governing principle is that declared by this Court in *First Iowa-Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U.S. 152. That holding was that the Federal Power Act superseded State law and that the securing of a State permit was not a condition precedent to the obtaining of a federal license. "The Act leaves to the States their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through

Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States." 328 U.S. at 171. "The detailed provisions of the Act," this Court said, "providing for the federal plan of regulation leave no room or need for conflicting state controls." 328 U.S. at 181.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted. The case presents issues which are not only important in the administration of the Federal Power Act but are also of pressing significance to the Federal Government's rights and powers over its vast properties in the West.

Respectfully submitted,

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